LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 9 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 260

DORIS NYYSSONEN, Administratrix,
Petitioner,

vs.

THE BENDIX CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MORRIS RELSON,
Attorney for Respondent,
405 Lexington Avenue,
New York, New York 10017.

Of Counsel:

ROBERT R. KEEGAN,
New York, New York.

INDEX

	PAGE
Introduction	1
Opinions Below	2
Questions Presented	2
Counter-Statement of the Case	3
1. Petitioner's 18-year "fight for his patent rights" was of his own creation	3
2. Petitioner had full opportunity for argument before both Courts below	4
3. The Findings of Fact reflect the District Court's own decision	4
4. Petitioner's charge that the Courts below failed to consider the full record has no foundations	5
Argument	5
1. Petitioner's Dissatisfaction with fact determinations (Question I)	7
2. Petitioner's Opportunity for Oral and Written Argument (Questions II and VI)	8
3. The Appellate Court's Limitations of Its Holding to One Issue (Question III)	10
4. Petitioner's Questions IV and V Are Fanciful	11

5. Petitioner's "Reasons for Granting the Writ" Are Insufficient 13

A. The Judicial System has NOT Broken Down 13

B. Encouragement to Inventors is NOT in Issue 13

C. No Issue Arises as to Rule 52(a) or 77(b) 14

D. There Is No Conflict With Other Decisions 14

E. There Is No Issue of Due Process 14

F. No "Further Issue" Exists 15

Conclusion 15

TABLE OF CASES

Altvater v. Freeman, 319 U. S. 359, 363 (1943) 10

Biggs v. Mays, 125 F. 2d 693 (C. A. 8, 1942) 8

Del Francia v. Stanthony Corporation, 278 F. 2d 745 (C. A. 9, 1960) 11

Graver Tank & Mfg. Co. v. Linde Air Prod. Co., 336 U. S. 271, 275 (1949) 6

Hap Corporation v. Heyman Manufacturing Co., 311 F. 2d 839 (C. A. 1, 1963) 11

Hodge et al. v. United States, 271 F. 2d 52 (C. A. 5, 1959) 8

Magnum Import Co. v. DeSpoturno Coty, 262 U. S. 159, 163 (1923) 15

Sinclair & Carroll Co. v. Interchemical Corp., 325 U. S. 327, 330 (1945) 10

United States v. Crescent Amusement Co., 323 U. S. 173, 184-5 (1944) 14

United States v. Yellow Cab Co., 338 U. S. 338 (1949) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 260

DORIS NYYSSONEN, Administratrix,

Petitioner,

vs.

THE BENDIX CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Introduction

This is an ordinary action for alleged patent infringement in which the District Court correctly found the two patents in suit to be not infringed and to be invalid. The Court of Appeals affirmed on the issue of non-infringement without expressly adjudging the issue of invalidity (although intimating that it considered one of the three patent claims in issue to be invalid).

Petitioner here* essentially complains that he was unsuccessful in meeting his burden of persuading the Courts below that his patent is infringed.

* "Petitioner" will refer both to the patentee-plaintiff below and his administratrix who is named petitioner here.

As shown below, no unusual questions of law or fact are involved and no reason exists for the intervention of this Court to review the concurrent holdings of the courts below. The only unusual aspect of the case stemmed from the patentee's lack of familiarity with the standard terms of the art,* which led him to coin his own special terminology where standard terms could have been used (R. 300-7, 384-5) and to use standard terms contrary to their accepted meanings (R. 306-7, 384-5), making it difficult to determine the nature and significance of his supposed invention. In essence, the patentee worked in ignorance of the art, and his work was simply a repetition of prior work in the field, which was explained in different language which made his work *appear* to be different in structure when in fact it is not.

Opinions Below

The opinions below are properly cited at P. 2**. However, petitioner has reproduced the District Court's findings of fact and conclusions of law in an excised version which creates a misleading impression; respondent therefore respectfully requests this Court to examine the entire findings of fact and conclusions of law entered by the trial court, appearing in the Record at R. 954 to 968, which better indicate the detailed consideration of the testimony and record in all of its relevant portions by the trial court and the matters reviewed by the appellate court.

Questions Presented (P. 3-6)

The questions asserted in the petition do not truly reflect the record or the opinions in this case. They are based

---

* The patentee was a mechanical engineer, with no special training or experience in electrical machinery of the type involved here (R. 430, 449).

** "P. 2" designates the Petition, page 2.

on argumentative assertions, assumptions contrary to fact, fallacious conclusions, and petitioner's contrary view of disputed facts found by both courts below, to such an extent that respondent finds it impossible to rephrase them to reflect actual questions in the case. They are discussed in more detail below under the headings "Counter-Statement of the Case" and "Argument".

Counter-Statement of the Case

The following statement is necessary to correct and supplement petitioner's statement of the case.

1. Petitioner's 18-year "fight for his patent rights" was of his own creation.

Petitioner solicits sympathy because he has assertedly been "fighting for his patent rights over a period as long as eighteen years" (P. 17; see also P. 7). The cold fact is that the present dispute stems only from October 1959 when respondent first advertised the accused products (R. 442, 698, 699).

The patentee "first brought his inventions to his attorney for patenting" in 1947 (P. 7). The two applications for patent were filed December 3, 1953, and April 29, 1955. The patents issued together on April 23, 1957. A charge of infringement was made (R. 552), leading to discussions in which respondent disclosed the grounds (subsequently confirmed by the Courts below) why there was no infringement. Suit was started in May, 1962. Trial was held in early March, 1963. The trial court decision was handed down April 29, 1963. The affirming decision of the Court of Appeals was issued March 3, 1965.

The eighteen-year period complained of by petitioner (P. 7, 17) was thus essentially entirely of his own making.

2. Petitioner had full opportunity for argument before both Courts below.

Following a seven-day trial at which an expert testified on behalf of each party, the trial court indicated that it did not desire oral argument, but would consider briefs and proposed findings. Both parties submitted briefs and proposed findings, and, in addition, each submitted a reply brief.

Plaintiff submitted 86 proposed findings in 22 typed pages, a six-page "Scientific Statement" by his expert, a brief of 41 typed pages, and a reply brief of 54 typed pages.

After the trial court's decision, plaintiff submitted a Motion under Rule 59(a) for a new trial (15 typed pages) and a Motion under Rule 52(b) for amendment to the findings (72 typed pages).

On his appeal, plaintiff asked for and was given leave to exceed the usual maximum length of brief, and filed a printed brief, including appendices, of 152 printed pages (instead of the usual 75 pages) and a reply brief of 25 printed pages. Plaintiff asked for and received leave for extra oral argument and used two hours for his argument (instead of the usually alloted one hour). The entire oral argument extended slightly over three hours.

3. The findings of fact reflect the District Court's own decision.

The trial court, as its memorandum opinion indicates (P. 14a), based its findings upon those submitted by defendant, but did not adopt them entirely or verbatim; the trial court in fact refused a number of proposed findings and revised others, while adopting still others verbatim.*

* Proposed findings 1-3, 7-12, 14, 57, 78-82, 86-88, and 91-93 were refused, although the substance of some (but not all) was adopted by the Court. Proposed findings 13, 18, 22, 29, 30, 32-37, 40, 41, 46, 49, 50-52, 62, 64, 65, 67-76, 83-85, 89, 90, and 94-96 were revised. Proposed additional findings 65a, 78a, 83a, 86a and 90a were refused.

The Court characterized them as "my own findings of fact", and expressly stated that they reflect his "independent and meticulous check of the record itself" (P. 14a).

The Court of Appeals pointed out that this procedure was not a "matter of rote" (P. 2a).

It is clear that the trial court determined the *substance* of the findings, and utilized the wording of respondent's draft merely to minimize technical error.

4. Petitioner's charge that the Courts below failed to consider the full record has no foundation.

Petitioner repeatedly asserts that both courts below considered only the direct testimony of defendant's expert and ignored his cross-examination (P. 5, 10, 13). This is utterly without basis. It is also directly contradicted by the Courts themselves.

The trial court said (P. 14a) his findings "do reflect my independent and meticulous check of the record". This included findings 58f and 60a (P. 15a) challenged by petitioner, and on which the Court of Appeals expressly said (P. 11a) "We think the trial court's interpretation of the patent in the respect under consideration is clearly correct . . ."

Petitioner's attack amounts to a challenge of the truthfulness of the District Court and to a charge that the Court of Appeals would affirm without review of the record. The sole basis for petitioner's accusation is that these courts refuse to construe a passage from the cross-examination of defendant's expert as petitioner would like them to construe that passage. As shown below, the courts below were perfectly justified in so doing.

Argument

This case has been properly decided on the basis of its own facts and it does not present any unsettled or dis-

putable questions of law. All that is involved is that two patents were held by the District Court to be invalid and not infringed, the Court of Appeals reviewed, and upon a careful independent analysis held the patent claims in issue to be not infringed* (without expressly adjudging the question of validity). No issue is presented which is likely to affect any other patent.

There is no conflict between circuits; the action of the Court of Appeals below is in full accord with applicable decisions of this Court and of the Courts of Appeals; the conduct of the trial court and the Court of Appeals, despite difficulties occasioned by the plaintiff's obfuscatory presentation of technical subject matter, was exceedingly competent and above valid criticism in respect to careful observance of and protection of the rights of the parties.

There is no question of general interest or public importance in the case. This case presents no special or important reasons justifying the extraordinary remedy of a writ of certiorari, and the petition should be denied because, as discussed more in detail below:

1. Mere dissatisfaction with the trial court's determination of disputed fact questions and its evaluation of testimony is not proper ground for the grant of a writ of certiorari (Petitioner's Question I).

2. Desire of the petitioner for an extraordinary opportunity to present additional oral and written argument on points already fully considered by both Courts below and upon which there was a generous opportunity to submit argument is not a proper ground for the grant of a writ of certiorari (Petitioner's Questions II and VI).

3. There is no reason for the Court of Appeals to be required to decide issues beyond those necessary to

---

* The Supreme Court should not undertake to review concurrent findings in the absence of a very obvious and exceptional showing of error. *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, 275 (1949).

dispose of plaintiff-petitioner's claim (Petitioner's Question III).

4. Petitioner's Questions IV and V are fanciful questions based upon a distortion of both the record and the opinions of the trial court.

5. Petitioner's "Reasons for Granting the Writ" (P. 15 to 18) are insufficient.

1. Petitioner's dissatisfaction with fact determinations. (Petitioner's Question I, P. 3, 11-12.)

The matter raised in petitioner's Question I deals entirely with the District Court's understanding (or alleged misunderstanding) of the testimony of an expert witness. This matter is hardly a proper matter for an appellate court, much less is it a "Question" which should be considered by the Supreme Court of the United States.

It should further be pointed out in justice to the expert that the meaning attributed to his statement by petitioner is a distorted one, as is shown by petitioner's own excerpt from the printed record. The proper meaning was of course clearer still when evaluated as live testimony by the trial court who heard the inflections of the spoken words.

Briefly, in the petition the expert's answer, "Well, you may interpret it that way", has been misrepresented by petitioner to mean—One skilled in the art might interpret it that way—.

It is clear even from the limited context printed in the petition Appendix E (P. 19a) and it was even clearer from the inflection heard by the trial court, that the gist of the answer was—Well, you, Mr. Rines (counsel for plaintiff), may stretch it by choosing to interpret it that way, but it is wrong to do so—.

Further discussion of this point is hardly merited, since nothing could be less appropriate for reconsideration by the Supreme Court of the United States than findings of

fact as to meaning of testimony given in open court before the trial judge, particularly where voice inflections may be significant. *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949).

2. Petitioner's opportunity for oral and written argument. (Petitioner's Questions II and VI, P. 3-4, 13 and 5-7, 14-15.)

Petitioner couches its "Questions" in such terms that it is difficult to understand what is complained of. However, it appears that the principal complaint here is limitation on oral and written argument.

As already shown above at page 4, petitioner's opportunity for argument in this case was greater than usual, since petitioner requested and received permission to exceed the limitation on both length of brief and length of oral argument provided by the rules of the Court of Appeals and had no limitation on length of brief before the trial court. Neither party upon oral argument before the Court of Appeals suggested that the time allowed was too short to adequately present its argument. It was only after two decisions adverse to petitioner that the presently urged necessity for further argument was asserted.

While petitioner unjustifiably complains here of insufficient opportunity for oral argument, there is no assertion that any argument *by brief* was curtailed by either the trial or appellate court. Nothing is more clearly within the discretion of a court than the regulation of oral argument before it. *Hodge et al.* v. *United States*, 271 F. 2d 52 (C. A. 5, 1959); *Biggs* v. *Mays*, 125 F. 2d 693 (C. A. 8, 1942).

It perhaps should be noted at this point that Question II represents that the Court of Appeals made a holding of non-infringement "for no reason at all". This comes close to being absurd on its face. The Court of Appeals opinion shows that the '098 patent was held non-infringed for

reasons substantially the same as some of the reasons given by the District Court. The '131 patent was held non-infringed because it was a so-called "sub-combination patent" held to be for the same invention as the '098 patent, and being for the same invention obviously could not be infringed when the common invention of the two patents was not used in defendant-respondent's devices.

Petitioner's Question VI charges that the Court of Appeals completely ignored the appeal with respect to the denial of the plaintiff's motions under Rules 52(b) and 59(a). This is incorrect. The Court of Appeals considered the proceedings below with respect to such motions and found they were directed solely to the question of validity (P. 12a). It therefore found it unnecessary to affirm the propriety of the denial of the motions, since the Court of Appeals chose not to destroy the patents by ruling upon their validity, and based its decision solely on non-infringement.

Petitioner's Questions II and VI relating to incomplete consideration of the issues by the appellate court are both illusory, being predicated on bare assumptions and non-existent facts, and presumptuous, in accusing both Courts below of not reviewing cross-examination testimony. Obviously, petitioner cannot have any direct knowledge as to whether the Courts below did or did not examine the record as a whole, or what other steps were taken by them in reaching their concurring decisions. Most charitably viewed, petitioner means only to express disagreement with the result reached—but he has no basis to challenge the process used by the Courts below in reaching that result. In any event, this subject is not properly the subject of review by this Court, and these questions should summarily be disposed of.

3. The Appellate Court's limitation of its holding to one issue. (Petitioner's Question III, P. 4, 13.)

The Court of Appeals in this case, though required only to determine that there was substantial evidence to support the findings of the trial court, Rule 52(a), F.R.C.P., made an independent analysis of the merits of the controversy and satisfied itself that, based on its own knowledge of this and related technology, acquired in this and other cases, defendant's accused devices did not embody the claimed invention as they did not employ his "stationary magnetic field" (P. 9a). The Court of Appeals found no fault with the other grounds upon which the trial court dismissed plaintiff's claim, but it rightfully declined to devote excessive time to determination of mooted issues. As stated by this Court in *Altvater* v. *Freeman*, 319 U. S. 359, 363 (1943):

> "To hold a patent valid if it is not infringed is to decide a hypothetical case."

Plaintiff's Question III indicates an unusual desire to have the Court of Appeals decide the additional issue of invalidity, which could not result in a change in the over-all result (i.e., dismissal of the complaint) but could result in an affirmation of the invalidity of petitioner's patents.

Perhaps if it were a relatively simple matter to review the question of invalidity, it would have been in the public interest for that question to be reviewed by the Court of Appeals, as suggested by *Sinclair & Carroll Co.* v. *Interchemical Corp.*, 325 U. S. 327, 330 (1945). However, the Court of Appeals, in the exercise of its discretion, has balanced the effort which would be required for such review (and time thus taken away from determination of other causes piled up in its backlog) against the problematical benefit to the public of a more exhaustive determination of the invalidity of the patents in this action. The Court rightly decided that the better course of action would be

to review only so much of the matter at hand as would dispose of petitioner's claim.

It is submitted that such decision of the Court of Appeals is proper, *Hap Corporation* v. *Heyman Manufacturing Company*, 311 F. 2d 839 (C. A. 1, 1963); *Del Francia* v. *Stanthony Corporation*, 278 F. 2d 745 (C. A. 9, 1960), but in any event, petitioner has no standing to try to substitute its discretion for that of the Court of Appeals by a petition for writ of certiorari.

4. Petitioner's Questions IV and V are fanciful (P. 4-5, 13-14).

Petitioner's Question IV is premised upon quotations distorted by being out of context and upon unsupported speculations with respect to the opinion of the District Court. The Court of Appeals could not possibly have the same view of the opinion and Findings of Fact of the trial court as the distorted view presented by petitioner's Question IV. The question is hypothetical and has no application to the present case.

The quotation at P. 4 from the District Court memorandum, "less likely to reflect original thought or expression," is taken out of context. (It is found in context at P. 18a.) The trial court said, in effect, at P. 18a that in a field of advanced technology, a lay judgment represents a "deliberate, informed and conscientious choice between preferred courses of action" more than "original thought or expression". The court did *not* say, as petitioner suggests, that the findings here were without original thought.

The substance of the trial judge's memoranda simply is that in such cases the court is impelled to adopt the technical wording of one of the parties, and to that extent the findings and opinion will necessarily contain less original thought or expression of the trial judge, but they will nevertheless represent a *deliberate, informed, and conscien-*

tious decision as to the relevant issues of the case. It can hardly be questioned that the most important function of the trial judge is to decide issues and not to draft technical phrases.

Petitioner asserts that the Findings of Fact, which the trial judge expressly stated "reflected my independent and meticulous check of the record itself," were in fact not checked against the entire record and specifically not checked against the cross-examination of defendant's expert witness. How petitioner could know the private acts of the court during formulation of the decision is difficult to surmise; certainly there is nothing of record on it. Presumably, petitioner bases his assertion here on the argument that the cross-examination testimony was so devastatingly contrary to the direct testimony that it must have been ignored by the trial judge. Nothing could be further from the truth, as is apparent from the laudatory comments which the trial judge made on the credibility and consistency of the testimony of defendant's expert witness. As shown elsewhere herein, the supposed contradictory cross-examination becomes fully consistent when the inflections heard by the trial judge are considered. Petitioner's Question IV must be dismissed as wholly without merit.

One might assume from petitioner's Question V (and also Question I, P. 3) that the trial judge had turned over the conduct of the case to defendant's expert witness and allowed him to decide the issues in the case. This would certainly be an unusual procedure which might merit the attention of higher authority if it were a fact. It certainly did not occur here.

Upon further consideration of petitioner's argument, it becomes apparent that this Question V is solely a fictitious creation of petitioner, stemming from the highly complimentary comments of the trial court with respect to the testimony of defendant's expert witness. The trial court in effect said (at P. 13a) that, although it was to be

expected that an expert witness would have some natural bias in favor of the party by whom he was employed, the Court found defendant's witness to be so successful at suppressing any tendency to bias, that the Court believed his statements to the Court were substantially as they would have been had he been an impartial Master appointed by the Court. Such praise for the opposition's expert witness is doubtlessly annoying to petitioner but it is hardly a basis for the Question V, which petitioner represents to this Court is present in the case.

The transparency of the distortions in the statements of Questions IV and V is such that they should be summarily dismissed from consideration as grounds for the grant of a writ of certiorari.

5. Petitioner's "reasons for granting the writ" are insufficient (P. 15-18).

The "Reasons for Granting the Writ" urged by petitioner at pages 15-18 of the Petition are frivolous and non-existent.

A. *The judicial system has NOT broken down* (P. 15).

Petitioner extravagantly leaps to the fallacious conclusion in his Reason A that the judicial system has broken down because the trial court in its discretion preferred to render its decision based upon written rather than oral arguments.

This is so openly without merit as to require no further discussion.

B. *Encouragement to inventors is NOT in issue* (P. 16-7).

Petitioner appears to argue in his Reason B that failure of the trial court to hold oral argument below will discourage future "lone" inventors and will deprive the nation of inventions of military value.

The *non sequitur* here is obvious.

C. No issue arises as to Rule 52(a) or 77(b) **(P. 17).**

Both Questions IV and V referred to here are premised upon speculative and presumptuous assumptions, that both courts below assertedly failed to consider the full testimony of defendant's expert witness, and that the trial assertedly was not conducted in open court, because the trial court considered the credibility of defendant's expert witness to be so high as to overcome a "natural bias" and to be as non-partisan as a master would be.

These assumptions are transparently without foundation in fact, and no question of scope of Rule 52(a) or Rule 77(b) exists.

D. There is no conflict with other decisions **(P. 17).**

While petitioner "invites" attention to ten prior decisions, none are here discussed. Elsewhere (P. 13-14) two are *asserted* as in conflict with the present case, as to Question IV, but no conflict is actually shown, and none exists.

As already shown, Question IV is based upon the false and unfounded premises that the courts below only partially reviewed the record, and rubberstamped defendant's expert. Since the contrary is true, no conflict can exist. It is noteworthy that in the *Louis Dreyfus* case (P. 14) the court upheld findings drafted by one party, as this Court has ruled should be done unless they are clearly erroneous. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 184-5 (1944).

E. There is no issue of due process **(P. 17).**

Denial of oral argument by the trial court is not denial of due process, since petitioner had unlimited opportunity for written argument and as shown above availed himself generously of that opportunity.

A fortiori, there was no denial of due process in the Court of Appeals, where leave was granted to have

briefs twice the normal size, and the oral argument took over three hours.

F. *No further issue exists* (P. 17-18).

There was no departure from the accepted and usual course of judicial proceedings, and when petitioner's fulminations are analyzed to reveal their substance, no departure is even argumentatively established.

Conclusion

The present petition is best characterized as a scattergun attempt to present supposed "Questions" and "Reasons For Granting the Writ" in such number and confusion that perhaps one will mistakenly be thought to merit review, whereas the case is actually an ordinary holding of non-infrigement of patents of doubtful validity.

It is clear that no issue worthy of consideration by this Court exists.

> "The jurisdiction [to bring up cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* v. *DeSpoturno Coty*, 262 U. S. 159, 163 (1923).

The petition should be denied.

Respectfully submitted,

Morris Relson,
Attorney for Respondent.

Of Counsel:
Robert R. Keegan